

## **Rule 35. Physical And Mental Examination Of Persons.**

(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical examination by a physician or a mental examination by a physician or a psychologist or to produce for the examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Examining Physician or Psychologist.

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses and conclusions, together with all like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled, upon request to receive from the party against whom the order is made, a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just and if a physician or psychologist fails or refuses to make a report, the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or psychologist or the taking of a deposition of the physician or psychologist in accordance with the provisions of any other rule or statute of this state.

(c) Medical Records.

(1) A party who relies upon his or her physical, mental, or emotional condition as an element of his or her claim or defense shall, within 30 days after the request of any other party, execute an authorization to allow such other party to obtain copies of his or her medical records. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. The term "medical records" means any writing, document, or electronically stored information pertaining to or created as a result of treatment, diagnosis, or examination of a patient.

(2) Any informal, ex parte contact or communication between a party or his or her attorney

and the physician or psychotherapist of any other party is prohibited, unless the party treated, diagnosed, or examined by the physician or psychotherapist expressly consents. A party shall not be required, by order of court or otherwise, to authorize any communication with his or her physician or psychotherapist other than (A) the furnishing of medical records, and (B) communications in the context of formal discovery procedures.

Reporter's Notes to Rule 35: - 1. Rule 35 is identical to FRCP 35. Prior Arkansas law was governed by superseded Ark. Stat. Ann. 28-357 (Repl. 1962) which tracked FRCP 35 prior to its 1970 amendments. This rule does not work any appreciable changes in Arkansas law.

2. FRCP 35 provides that it does not preclude the taking of a deposition or discovery of a medical report in accordance with the provisions of any other rule. Rule 35 follows this and provides that any statute of this State may provide for additional discovery. Specifically, this rule does not affect Ark. Stat. Ann. 28-607 (Supp. 1975).

Addition to Reporter's Note, 1990 Amendment: - New subdivision (c) of this rule sets out the circumstances under which a party must authorize release of his medical records to another party. It also makes plain that a party may not be required to allow an adversary to communicate with the party's physician or psychotherapist outside the formal discovery process. This safeguard is deemed necessary to protect the confidential relationship between a party and his physician or psychotherapist.

Addition to Reporter's Notes, 1997 Amendment: - Subdivision (a) has been amended to permit the appointment of psychologists to conduct mental examinations, and subdivision (b) has been revised to reflect this change. As amended, the Arkansas rule is similar to the version of the corresponding federal rule that was in effect from 1988 to 1991. The current federal rule is broader, allowing physical or mental examinations "by a suitably licensed or certified examiner." Because the impact of such an expansive provision at the state level could be considerable, only an incremental step - i.e., permitting mental examinations by psychologists - has been taken at this time, and that step is consistent with Arkansas practice. Under Rule 702 of the Arkansas Rule of Evidence, a psychologist may testify as an expert about the mental condition of a party or other person. See, e.g., *Burns v. Burns*, 312 Ark. 61, 847 S.W.2d 23 (1993) (divorce); *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978) (child custody). It makes little sense, therefore, to preclude a psychologist from conducting an examination pursuant to Rule 35. Moreover, psychologists are trained to conduct mental examinations, which are a routine, widely accepted part of the practice of psychology in both forensic and non-forensic settings.

The amendment to subdivision (c) imposes a 30-day deadline for responding to a request for an authorization to obtain copies of a party's medical records. A companion change in Rule 37(a) provides for a motion to compel if the authorization is not provided in a timely manner.

Addition to Reporter's Notes, 1998 Amendment: - Subdivision (c) has been divided into numbered paragraphs and reorganized. It has been also amended to address an issue on which the Arkansas federal courts have disagreed. Compare *Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992), *aff'd*, 982 F.2d 1255 (8th Cir. 1993), with *King v. Ahrens*, 798 F. Supp. 1371 (W.D. Ark. 1992). Consistent with the result reached in *Harlan*, the first sentence of paragraph (2) provides that a party or his or her attorney cannot interview or otherwise informally contact another party's treating physician or psychotherapist without that party's consent. This new provision reflects the intent of the original version of the rule, i.e., to limit communications with a party's physician or psychotherapist to the formal discovery process. A corresponding

change has been made in Rule 503(d)(3), Ark. R. Evid.

Addition to Reporter's Notes, 2004 Amendment: - A new sentence has been added to subdivision (c)(1) to provide that the 30-day response time may be lengthened or shorted by the court or by written agreement of the parties. Corresponding provisions appear in Rule 33(b) and Rule 34(b)(2), which apply to interrogatories and production of documents, respectively.

**History Text:**

History. Amended May 13, 1991, effective July 1, 1991; amended November 18, 1996, effective March 1, 1997; amended January 22, 1998; amended January 22, 2004

**Associated Court Rules:**

Rules of Civil Procedure

**Group Title:**

V. Depositions and Discovery

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